IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-654

THE GREAT ATLANTIC & PACIFIC TEA COMPANY, INC.,

Petitioner,

—against—

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONER

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This reply brief is submitted on behalf of petitioner The Great Atlantic & Pacific Tea Company, Inc. ("A&P") in response to the brief for the Federal Trade Commission (the "Commission" or "FTC").[1]

At the outset, we are constrained to note a few of the more fundamental inaccuracies in the Commission's description of this case. As noted in our main brief (at pp. 8, 10), there has

[1] A&P's initial brief and the Commission's brief are abbreviated "A&P Br." and "FTC Br.". "Pet. App." refers to pages of the Appendix to the Petition for Certiorari, and "A" refers to pages of the Appendix.

never been any dispute about the following comparison of the prices offered to A&P:

	Quarts	Half Gallons	Gallons
Borden's Original Quote	$.1855	$.3430	$.6860
Bowman's Offer	.1696	.3136	.6272
Borden's Final Offer	.1712	.3124	.6248
Final Difference Per Quart .	($.0016)	.0006	.0006

In short, the Bowman offer (the legality of which is unquestioned) was at prices which were substantially lower than Borden's initial quote and very close to the Borden offer accepted by A&P. In the final analysis, Bowman was still lower on quarts by 1.6 mills, while Borden was lower on half gallons and gallons by .6 of a mill per quart — or about ⅓ of 1% of the final Borden prices.[2] On an overall basis (including the price of by-products held not relevant) the most that the Commission claims is that Borden was lower by "nearly $83,000 in additional annual savings" (FTC Br. 9) on annual sales of over $5,600,000, which is only 1.5%. Yet, in the face of these indisputable facts, the FTC brief repeatedly states that Borden's prices were substantially lower than Bowman's prices (*e.g.*, FTC Br. 9, 20, 26, 33, 35).

Even more flagrantly unfair are the FTC's repeated attempts to stretch the facts of this case to make them fit the "lying buyer" rule applied in *Kroger*.[3] It asserts that, after Borden had offered $820,000 in "annual savings", Elmer Schmidt of A&P told Gordon Tarr of Borden "sharpen your

[2] Sales of these three homogenized milk items in paper containers in the Chicago-Calumet area accounted for the vast preponderance of the allegedly discriminatory sales (even before the court below found it had "no Robinson-Patman jurisdiction" over sales of by-products, *e.g.*, cottage cheese, buttermilk, skim milk, sour cream, etc., Pet. App. 13a, n.7). As we pointed out previously, the prices quoted by Bowman were for brand label or private label products (at A&P's option), and were otherwise more favorable to A&P (A&P Br. 7, n. 10; 8, n.12; 10).

[3] *Kroger Co.* v. *FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

pencil a little bit because you are not quite there" and that based on this the "administrative law judge found that 'A&P gave false price information to Borden as to Bowman's competing bid' (A. 1151a-1152a), and the Commission adopted that finding" (FTC Br. 21; see also, FTC Br. 8, 37-39). Both the record and the opinions below are to the contrary.

Mr. Tarr was the only witness to recall any "sharpen your pencil" remark, and he testified that it had no material effect but only resulted in an "insignificant" or "slight, if any, change" in by-product prices (A141a-143a). Actually, the only adjustment in by-product prices was made before Borden's "$820,000 annual savings" offer, which was never improved upon (A571a, 643a, 770a-771a, 774a-775a). Moreover, the administrative law judge's finding of fact 166 (on which the FTC's brief relies) referred to very different matters as to which he was reversed.[4] The Commission's opinion refers to the "sharpen your pencil" testimony only in noting its irrelevance (see notes 3 and 5 at A1199a-1200a); neither the Commission nor the court of appeals mentioned it in considering the § 2(f) charge (as the FTC's brief concedes at p. 38, n.30).

Thus, the facts are that A&P has been exonerated of any affirmative misrepresentation but has been convicted of a 2(f) violation on the ground that it "induced" Borden's final offer (by considering the Bowman offer) and accepted it believing it was better than the Bowman offer. The Commission's attempt to present this as a "lying buyer" case (FTC Br. 36-40) is empty rhetoric.

A more accurate statement of this case is made in the *amicus curiae* brief submitted on behalf of the Small Business Legislative Council ("SBLC"), a 56-member lobbying group which views purchasers' efforts to obtain lower prices as "predatory", "anticompetitive", and "evil" (SBLC Br. 6). The

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[4] He was referring to such matters as A&P's representing that "it had a bid [from Bowman] which could be compared to Borden" when the ALJ found that Bowman's bid was conditional and not comparable (FF 166, A1151a-1152a; FF 114, A1112a-1113a). These findings were reversed by the FTC (Pet. App. 36a, n.2).

SBLC asserts: "A&P's statements of inducement to Borden that its initial offer was 'not in the ballpark' and that a $50,000 reduction 'would not be a drop in the pocket' were tantamount to affirmative misrepresentation" even though "such statements . . . were literally true . . ." (SBLC Br. 11). The difference between these true statements and the fraudulent misrepresentations in *Kroger* is readily apparent.

The FTC's brief again prefers *ipse dixit* to plain fact on the cost justification issue. As the opinion below made clear:

> "[T]he Commission did not itself submit a cost study to show the absence of cost justification [footnote omitted]. A finding of § 2(f) liability, therefore, has been arrived at without a square holding as to the factual absence of cost justification." (Pet. App. 24a-25a)

Both the Commission (Pet. App. 48a) and the court of appeals (Pet. App. 9a, 24a) compensated for this failure to show lack of cost justification by holding that the burden of proof on that issue shifted to A&P when Commission counsel presented some evidence that A&P had reason to doubt that Borden's prices could be cost justified.

The FTC's brief, however, takes a new tack. It purportedly accepts "A&P's argument that, under *Automatic Canteen,* the Commission must introduce some evidence of both the lack of cost justification and the buyer's knowledge thereof", and argues that Commission counsel *did* show a lack of cost justification (FTC Br. 54). It contends that the above-quoted statement by the court below is incorrect, that the court's error "can best be explained either as a simple oversight or as a reference to the absence of a formal cost study by the Commission" and that the court "overlooked the fact that the Commission expressly adopted the ALJ's finding that Borden's price discrimination could not be cost justified" (FTC Br. 54, n.40, citing FF 109, 110; A1109a-1110a). These "ALJ findings of fact", however, were based solely on the "Malone calculations" which were *rejected* by the Commission as insufficient to show

the absence of cost justification (Pet. App. 50a; 51a, n.25). Furthermore, the Second Circuit confirmed this in the footnote omitted from the above-quoted portion of its opinion.[5]

The Commission's other contentions which seem to merit response are answered below.

I.

THE DECISION BELOW ARTIFICIALLY RESTRAINS COMPETITIVE BIDDING.

This first point of our main brief (A&P Br. 16-20) is hardly adverted to by the Commission, except when it says: "A buyer that merely solicits bids and accepts the lowest offer would not violate Section 2(f); something more is necessary. The Robinson-Patman Act demands a showing of competitive injury . . ." (FTC Br. 40). The Commission's action in this very case, however, demonstrates the nebulous nature of this "something more". It held: "The Robinson-Patman Act does not require proof that injury actually occurred but merely a showing that competition *may* be reduced because discrimination took place" (A1207a, emphasis in original). The Commission found this test satisfied since price differentials in "industries such as retail food, which are characterized by keen competition and low profit margins . . . . compel an inference of adverse competitive effect" (A1208a). In other words, the "something more" is readily assumed in any highly competitive industry, in

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[5] There (Pet. App. 24a, n.11), the court found that, apart from an A&P cost study held insufficient by the FTC (in large measure because it was not contemporaneous), "the only other evidentiary material as regards cost justification" was the data prepared by Joseph Malone (principally for use in the A&P negotiations) on which the FTC refused to rely. Malone, an accountant on Borden's staff, admitted that his figures did not even attempt to show the true cost of serving A&P or to compare it with the cost of serving other customers (A30a-31a, 42a-44a, 51a-52a). While the Commission cited Malone's calculations as evidence that A&P had reason to doubt cost justification (Pet. App. 50a), we submit that they are no more reliable for that purpose.

which the only way for the buyer to avoid § 2(f) liability would be to refuse the lower price.[6]

At bottom, the fact remains that in Count I the Commission examined the "same conduct" here challenged under § 2(f) and determined it did not constitute an incipient violation of "the policy of the Robinson-Patman Act" (Pet. App. 5a, 37a; A&P Br. 17-19). The Commission sees no inconsistency in claiming that this same conduct constituted an actual violation of the Robinson-Patman Act because such a violation requires "much more" proof, going *beyond* what would be required under Section 5 of the FTC Act. The only additional proof to which it refers is that the buyer "having actively induced Borden's bid, deliberately accepted a discriminatory price that it knew could not be cost-justified" (FTC Br. 41, n.32). But in virtually all competitive bidding situations, the buyer will have "actively induced" and "deliberately accepted" the lowest bid without knowing whether a cost justification defense is available. Thus, the FTC's argument would make a risky business of any use by buyers of competitive bids.

A&P's negotiations with Borden were exhaustively examined under the more encompassing standards of Section 5, and the Commission not only held A&P innocent but held it could reach no other result consistent with the public interest (Pet. App. 36a-39a). We submit that the same public interest also requires dismissal of the more technical charge. In its recent ruling in *United States* v. *United States Gypsum Co.*, 98 S. Ct. 2864 (1978), this Court reaffirmed its rationale in *Automatic Canteen Co. of America* v. *FTC*, 346 U.S. 61 (1953),

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[6] Although the Commission's opinion feared "a scenario where the seller automatically attaches a meeting competition caveat to every bid" and held that disclosure of competitive prices would be inappropriate (Pet. App. 39a), the FTC's brief offers no solution to the dilemma thus posed for buyers who wish to take advantage of lower prices. On the one hand, it makes light of the "spectre of exposing buyers to liability for engaging in ordinary business practices" (FTC Br. 40-41), while on the other, it condemns A&P for engaging in the ordinary business practice of seeking competitive offers and accepting the one which appeared best (FTC Br. 6).

> "that as a general rule the Robinson-Patman Act should be construed so as to assure its coherence with 'the broader antitrust policies that have been laid down by Congress' . . ." (98 S. Ct. at 2884).

The Court there condemned practices which would, in the name of the Robinson-Patman Act, "have the effect of eliminating the very price concessions which provide the main element of competition in oligopolistic industries and the primary occasion for resort to the meeting competition defense" and would thus "contribute to the stability of oligopolistic prices and open the way for the growth of prohibited anticompetitive activity" (98 S. Ct. at 2883-84). The Commission's argument here is in stark contrast; it urges that the Robinson-Patman "Act makes uniform prices to competing customers the rule" and appeals to "the basic statutory requirement of uniform pricing" (FTC Br. 29). This advocacy of price uniformity and stability is, we submit, clearly inconsistent with "the broader antitrust policies that have been laid down by Congress".

II.

A&P SHOULD NOT HAVE BEEN DEPRIVED OF THE "MEETING COMPETITION" DEFENSE.

Our main brief pointed out (at p. 22) that buyer liability has been held dependent on seller liability under the Act in every prior case except for *Kroger*. The Commission answers "it is far from clear" that Borden had a meeting competition defense (FTC Br. 26-27 & n.23). What is quite clear, however, is that there was no finding that Borden did *not* have such a defense. The Commission therefore suggests that, if there was a failure of proof in this regard, the case should be remanded to it to remedy this failure (FTC Br. 28, n.24). We submit that no such remand is warranted (the Commission having failed to prove the absence of any Robinson-Patman defense and A&P's knowledge thereof), particularly at this late date.

Commission counsel tried and won this case below on the theory that, even when the seller has a meeting competition

defense, the *Kroger* case should be extended to deny that defense to a buyer who accepts his offer knowing it is the lowest offer. If that ruling is reversed (as we respectfully urge it should be), it would seem highly inappropriate to revivify this proceeding (which consumed 110 hearing days examining a 1965 transaction) for the purpose of allowing the Commission to reverse its field and have another go at A&P under a different theory.[7]

The Commission also argues that the buyer may be liable when the seller is not because a "buyer's good faith" requirement should be engrafted onto the statute (FTC Br. 28-29). Section 2(f), the only provision of the Act relating to buyers, does not mention good faith but proscribes the knowing inducement of "a discrimination in price which is prohibited by this section [2]". Section 2 permits price discriminations by a seller acting in good faith to meet competition, and the "buyer is not liable under § 2(f) if the lower prices he induces are . . . within one of the seller's defenses" (*Automatic Canteen Co. of America* v. *FTC*, *supra*, 346 U.S. at 74). The Commission's attempt to add a "buyer's good faith" requirement is not supported by this statutory scheme.

A requirement of "good faith" seems innocuous in the abstract, but here the Commission defines a "lack of good faith" in such a way as to condemn honest bargaining. It faults A&P because it was not satisfied with the first offer it received but "put the matter up for outside bids" (FTC Br. 6), and then accepted a revised offer from Borden in the *belief* that it was lower than the competing bid.[8] Thus, the Commission would

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[7] If the Court should rule otherwise, however, any remand should include a plenary hearing on whether Borden was guilty of illegal price discrimination under § 2(a) and whether Borden's prices to A&P were cost-justified, on which basic issues there have been no findings to date.

[8] The Commission's opinion states:

> "For example, if the Borden bid '*beat*' the Bowman bid yet A&P contemporaneously reasonably believed that it only *met* the bid, we believe A&P (as well as Borden, if Borden prudently reached the same conclusion) could assert the meeting competition defense." (Pet. App. 42a, emphasis in original)

find a lack of "good faith" on the buyer's part whenever he looks for a competing seller and harbors the thought that the price he ultimately accepts is the lowest price offered him. That kind of "bad faith" is, of course, indigenous to any competitive buying situation.

A. The Availability of the "Meeting Competition" Defense to the Buyer Should Not Depend on the Fortuitous Exact Matching of Both Bids.

Since an exact matching of competitive bids can hardly be expected in real life, the meeting competition defense is available even to a seller who makes a better offer, provided that he does so in good faith (A&P Br. 22-25). As this Court stated in *Gypsum:* "A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient" (98 S. Ct. at 2881). The FTC agrees as to sellers, but nevertheless insists that buyers are not free to accept the best offer (FTC Br. 28-30). By this stringent application of the "meet but not beat" standard to buyers, the FTC would prevent such sales except in the extraordinary situation of a precise "mirror image" duplication of competitive bids.

In short, what the seller may lawfully offer, the buyer may not accept since buyers "are not ignorant of the competing offers" and "sellers and buyers may be treated differently under the Act" (FTC Br. 30). Such a rule would artificially restrict competitive buying. The first bid received from a seller who mentioned meeting competition would establish the buyer's legal floor, and he could not accept a lower offer made on that basis.

A seller who intends only to meet a competing bid may offer a lower price because he is uninformed as to the price level of the other bid; he simply quotes a price which will yield a satisfactory return. Though the buyer may have "induced" him to do so by truthfully disclosing his receipt of an offer that was

lower than the seller's original price (without disclosing details of the competing offer), the truthful buyer should not then be condemned for "inducing" a "mistaken bid". In such circumstances, there is no reason in law, economics or common sense to hold the buyer liable for accepting what he believes is the lowest price available to him.[9] As the FTC wrote in dismissing Count I of the instant complaint:

> "We . . . do not think that changing the rules of commercial bargaining in this way is the answer. We are fearful that such a change would harm the freedom of buyers to engage in aggressive bargaining over price and would thereby affect competitive distribution." (Pet. App. 38a)

B. The Borden Offer Was Not "Substantially" Better Than the Bowman Quote.

The Commission's brief suggests that, even if accepting a lower bid does not always deprive a buyer of the 2(b) defense, it does when the difference is "substantial" (FTC Br. 35). By any definition of that term, however, Borden was not "substantially" below Bowman here.[10]

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[9] It is quite a different situation when a seller's lower price results from the buyer's affirmative misrepresentations as to the existence or the price level of a competing bid (as was the case in *Kroger*). Only in such a case can it be seriously contended that allowing a buyer to rely on the seller's § 2(b) defense would defeat the essential purpose of § 2(f) by enabling the buyer to profit by his own cupidity — and even then we submit that the buyer's conduct should be condemned under § 5 of the FTC Act (see A&P Br. 27, n.26).

[10] What the FTC means by "substantial" is nowhere defined, but the *most* the FTC has ever claimed is that the "annual savings" promised by Borden were some $83,000 more than the $737,000 offered by Bowman — which Schmidt of A&P calculated using only Bowman's prices on the same 11 items offered by Borden in private label (FTC Br. 9-10). This alleged difference between the annual savings offered by Borden and Bowman is only 1.5% of the $5,600,000 purchase price for the 11 items on which the "savings" were calculated (or even less if the $7,500,000 price for all 22 items is considered). In comparison, Borden offered to all volume purchasers,

The only evidence cited to support the Commission's argument is Herschel Smith's statement that a comparison prepared by his subordinate Elmer Schmidt gave one the impression that Borden's bid was "substantially better" than Bowman's. Our initial brief quoted that portion of Mr. Smith's testimony, and it showed that he found the price difference between the two bids to be "infinitesimal" or "a matter of mills" (A&P Br. 12-13), as the prices themselves attest (p. 2 above).[11] But assuming, *arguendo,* that A&P *thought* that Borden was offering a substantially lower price, A&P's state of mind would not bring it within the rule of *Automatic Canteen* that "a buyer is not liable under § 2(f) if the lower prices he induces are *either* within one of the seller's defenses . . . *or* not known by him not to be within one of those defenses" (346 U.S. at 74, emphasis added).

To aid their assault on the meeting competition defense, Commission counsel also attempt to retread their previously-discredited arguments attacking the Bowman bid. They imply that A&P may not have intended to give "serious consideration" to Bowman's offer (FTC Br. 6), citing to findings of

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regardless of method of delivery, discounts of 26% and more (A829a-832a).

In fact, little or no savings were realized by A&P. Borden eliminated half the "discount" by reducing its Borden brand prices generally (A&P Br. 5, n.6; compare the prices appended to the ALJ's initial decision for the period 1/66-2/66, A1183a-1192a, with Borden's August 1965 quotation for the Chicago-Calumet area, A643a). The other half was hardly enough to cover the increased labor, promotional and other expenses which A&P incurred in converting to private label and limited service (A200a, 305a-307a, 318a-319a). Thus, A&P simply did not receive the extra profit the FTC's brief (at p. 15) suggests A&P should have passed on to its customers.

[11] The Commission charges that A&P "strains credulity" by arguing that, when non-price factors are considered, and the bids are properly analyzed, the Bowman bid was lower overall (FTC Br. 11, n. 12). Yet in *Harbor Banana Distributors, Inc.* v. *FTC,* 499 F.2d 395 (5th Cir. 1974), after carefully comparing non-price factors, the court of appeals held that the challenged price "may not even have been favorable enough to meet competition" (FTC Br. 32, n.25). It is not incredible, moreover, that a buyer might pay a slightly higher price to avoid disrupting a satisfactory relationship with an existing supplier; that is what Borden expected A&P would do here (A85a-87a, 143a-145a), and is consistent with what A&P told Bowman (A474a-475a).

fact by the administrative law judge which were rejected by the Commission itself.[12] They also assert that the Commission, in reversing the ALJ, found that "the Bowman bid was genuine and comparable *if adjusted*" (FTC Br. 6, n.7; emphasis added). The Commission's findings, however, contained no such condition but unqualifiedly held Bowman's bid "comparable and operative" (Pet. App. 36a, n.2; 43a).

As a parting shot on this issue, the FTC's brief asserts that A&P "did not seek to clarify certain aspects of the Bowman bid that would have significantly affected its net costs" (FTC Br. 6, n.8). This is a further reference to the argument that Bowman's offer was conditioned on a volume of purchases higher than A&P's actual volume and on fewer deliveries in the Gary-Hammond area of Indiana than were permissible under union requirements there (FTC Br. 11, n.12). In fact, Bowman advised A&P that there was no volume requirement,[13] and reduced delivery in Gary-Hammond was unimportant.[14] These quibbles were all rejected by the Commission itself when it found the Bowman bid fully operative and comparable and set aside the very findings on which its brief now relies (FF 106, 107, *et al.*, cited at FTC Br. 11, n.12, *expressly overruled* at Pet. App. 36a, n.2). Thus, the validity and comparability of the Bowman offer is no longer subject to challenge.

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[12] In support of his view that the Bowman bid was a "sham", the ALJ relied on hearsay testimony given in *another* FTC proceeding, which did not involve these parties, by a deceased individual who was mentioned for the first time in his opinion (FF 212, A1175a-1176a; FTC Br. 6, n.8). He also cited A&P's failure to ask Bowman for a letter of availability, although A&P normally asked for such a letter only after it had decided on a particular supplier (A305a, 319a-323a), and Bowman had in fact assured Schmidt that the Bowman offer would be made available to other customers (A475a, 484a-485a, 494a-495a). After these facts had been called to the FTC's attention, it categorically rejected Judge Hinkes' "sham" findings (Pet. App. 36a, n.2; 43a).

[13] Bowman's prices were firm as long as Bowman was allowed to supply all of A&P's stores (A465a-466a, 468a). In its offer, Bowman set forth separate (and higher) prices if it were to receive only 70% or 50% of A&P's stores but made no reference to volume (A703a).

[14] Bowman believed that reduced deliveries were possible (A486a-488a). Moreover, A&P's expert cost accountant calculated that the extra delivery days in Gary-Hammond would have increased Bowman's costs by only a few hundred dollars per year on millions of dollars of annual purchases (A996a-1).

C. The Ruling in *Kroger* is Clearly Inapplicable here.

Assuming, *arguendo*, that the Sixth Circuit's ruling in *Kroger* is correct, it did nothing more than impose on buyers who assert a "meeting competition" defense a good faith requirement which would prohibit the kind of fraudulent conduct found in *Kroger*. It has no application to a buyer who truthfully advises a seller that he has a better offer.

The FTC disputes our contention that *Kroger* turned on the buyer's misrepresentation, and argues that the Sixth Circuit focused instead on the price level of the seller's bid (FTC Br. 37, n.28). That statement is belied by the unequivocal language of *Kroger* which we quoted previously (A&P Br. 26): "The controlling point here is not the 'hard bargaining' nor the 'price levels' but the *misrepresentation* of the [competing] bid, in order to induce a discriminatory price" (438 F.2d at 1378, emphasis in original).

The Commission next contends that, even though *Kroger* be limited to "cases in which the buyer affirmatively misrepresented the price offered by a competitor" (FTC Br. 36), A&P is nevertheless liable. It alleges that, after Borden had offered A&P $820,000 in "annual savings", Schmidt told Borden salesman Tarr: "sharpen your pencil a little bit because you are not quite there" and Borden thereafter reduced its price "somewhat further" (FTC Br. 37). Mr. Tarr, the only witness to mention this comment (although he did not recall it during his extensive pre-complaint and pre-hearing depositions, A125a-141a, 883a-892a), said that subsequently there was no "material" price change by Borden but only an "insignificant" or "slight, if any, change" in by-product prices (A141a-143a; see also pp. 2-3 above).[15]

[15] The court below ruled it had no Robinson-Patman jurisdiction over by-products, but in fact the only adjustment in by-product prices was made at the time of Borden's first complete private label proposal offering A&P savings of $410,000 (A643a-676a). Thus, if this "sharpen your pencil" remark was made at all, and had any influence on Borden, it would have been some time prior to the $820,000 offer and would have had no effect at all on the final prices. Mr. Tarr himself acknowledged at the hearing that he "may not have these things in proper sequence" as far as the private label negotiations are concerned (A138a-140a).

The only other possible "misrepresentation" alluded to by the FTC's brief is that, when Mr. Schmidt asked Borden to exclude glass gallons of milk from its private label offer, he said he was doing so because the competing bid did not include them, when actually he wanted glass gallons excluded for reasons of A&P's convenience (FTC Br. 37, n.29). There is no claim that this incident had any effect on the "savings" Borden offered; these remained at $820,000 before and after the "glass gallon" discussion and the time when the FTC asserts the "sharpen your pencil" comment was made. Thus, neither comment had any significance in the negotiations.[16]

The Commission found both of these alleged misrepresentations "not relevant to the charge" (Pet. App. 37a, n.5). Although that finding was made in discussing Count I (under Section 5 of the FTC Act), they were clearly not considered relevant to the 2(f) charge by either the Commission or the court of appeals (FTC Br. 38, n.30). The FTC's proposal (FTC Br. 38, n.30) that this Court should now make new findings of material misrepresentation based on these discredited allegations, and affirm on that basis, has neither factual support nor legal merit.[17]

Moreover, even assuming that Mr. Schmidt did state that Borden should "sharpen its pencil" because it was "not quite there yet" at the time of the Borden glass gallon quote (as alleged in the FTC's brief), that statement would have been entirely accurate since Bowman was well below Borden on glass gallons and Borden's September 1965 quotation had clearly not met the Bowman quote (A283a-286a, 305a-306a, 712a-735a, 772a, 942a).

[16] Borden's initial offers did not include glass gallons, and Schmidt's previous comparison of the competing bids was limited to the 11 items initially offered by Borden (A772a). A&P's reason(s) for not wanting the gallon jugs in private label (which is all the FTC questions) could have had no adverse impact on Borden whatever they were. On the other hand, the *fact* that the gallon glass items were eliminated benefitted Borden by (a) allowing it to charge A&P, for milk in gallon glass containers, over $100,000 more per year than Bowman would have charged, and (b) eliminating this unfavorable comparison when Schmidt's analysis of the two bids was forwarded to Mr. Smith in New York.

[17] "A reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make,

From the beginning, complaint counsel here have insisted that A&P's inducing a better offer by soliciting a competitive bid, and then silently accepting it, was itself a violation of § 2(f). That is the theory on which A&P was held liable below, and which the FTC also defends here (FTC Br. 26, *et seq.*). However, apparently concerned about the continued viability of its "silent buyer" theory, the FTC's brief now strains the facts of this case in a desperate effort to make them fit the conduct condemned in *Kroger*. In doing so, Commission counsel part company with the court below (which called the distinction between a lying buyer and a silent buyer "a fine one indeed", Pet. App. 21a), with the evidence in this case, and with the facts as found.

D. The *Gypsum* Case Does Not Support the FTC's Position.

The Commission purports to find comfort in *Gypsum's* comment that: "It may also turn out that sustained enforcement of § 2(f) . . . will serve to bolster the credibility of buyer's representations" (98 S. Ct. at 2882 n.30, FTC Br. 30). We have already indicated (pp. 6-7 above) that our position is entirely consistent with the rationale of that case. There, this Court held that "interseller verification" is not a permissible response to the "limited number of situations [in which] a seller may have substantial reasons to doubt the accuracy of reports of a competing offer and may be unable to corroborate such reports in any of the generally accepted ways" (98 S. Ct. at 2883).

Had Borden wished to corroborate A&P's report of a competing offer (which was true), among those "generally accepted ways" the *Gypsum* Court mentioned "reports of similar discounts from other customers", "efforts to corroborate the reported discount by seeking documentary evidence or by

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must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis." *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947).

appraising its reasonableness in terms of available market data", and "the seller's past experience with the particular buyer in question" (98 S. Ct. at 2882). An example taken from this record is that Mr. Cannon of Bowman testified that Bowman's offer was not made on a meeting competition basis but Bowman's practice was "not [to] meet competitive offers without a written statement from the customer . . . witnessed by your salesman and submitted to Mr. Hart . . ." (A470a).[18]

Thus the seller who is genuinely concerned about whether he is actually meeting competition has both the means of inquiry and the option of refusing to go further. There is simply no need to compel honest buyers to adhere to a stringent "meet but not beat" requirement and forego the lower prices that should result from comparison shopping and robust bargaining. To require them to do so would have the effect of "eliminating the very price concessions which provide the main element of competition", a result this Court disapproved in *Gypsum* (98 S. Ct. at 2883-84). This attempt by the FTC to erode the meeting competition defense, and to force buyers to become conduits for the exchange of price information between sellers, should fare no better.

III.

THE DECISION ALSO IMPROPERLY DEPRIVED A&P OF THE BUYER'S COST JUSTIFICATION DEFENSE.

A&P's initial brief pointed out that the court below failed to follow *Automatic Canteen* when it "made no finding negativing the existence of cost savings . . ." (346 U.S. at 66) and

[18] The ALJ's opinion stated that Mr. Cannon's testimony would have been supported by Mr. Hart, Bowman's outside counsel, had he lived to testify (A&P Br. 7, n.9).

In a passage quoted by this Court in *Gypsum*, the brief of the Department of Justice argued: "If, after making reasonable, lawful, inquiries, the seller cannot ascertain that the buyer is lying, the seller is entitled to make the sale" (98 S. Ct. at 2882 n.29). Where the buyer is not lying, then we submit that both the buyer and seller should be entitled to make the sale.

instead held against the buyer without a "square holding as to the factual absence of cost justification" (Pet. App. 25a, A&P Br. 28-34). The FTC's response is critical of both the court below (see pp. 4-5 above) and *Automatic Canteen.*[19] It asserts that since the Commission found that the buyer should have known that the prices offered to him could not be cost justified, the same evidence "served simultaneously to demonstrate" lack of cost justification (FTC Br. 44).[20] On that basis, ignoring both the elaborate formula the Commission set up to justify shifting the burden of proof on cost justification to A&P (A&P Br. 29), and the court of appeals' finding as to the absence of any determination of that issue, the FTC's brief blandly asserts that "the Commission's evidence showed . . . the actual lack of cost justification" (FTC Br. 63, n.46).

When a buyer purchases on the same terms and conditions as his competitors (so that cost differences between the two cannot exist) but receives special discounts or allowances not offered to others, then proof of those facts, and that the buyer knew them, may at the same time show both the factual absence of cost justification *and* the buyer's knowledge of it (as in *Fred Meyer, Inc.,* discussed at A&P Br. 34). However, the teaching of *Automatic Canteen* is that where (as here) the buyer receives fewer services or purchases in greater quantities than his competitors, the Commission must show that the cost

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[19] The FTC's view of *Automatic Canteen* is indicated by, among other things, its description of that case as "a departure from the result that might have been expected solely on the basis of the statutory language" and "a modification of the apparent commands of Section 2(b)" (FTC Br. 46-47).

[20] The Commission admits that this may not always be so (FTC Br. 63, n.46). However, since the items of evidence relied on here (pp. 20-26 below) are all seller's self-serving statements, it seems doubtful that the Commission would ever recognize a case in which lack of cost justification would have to be shown independently or by better evidence.

On the other hand, the lack of proof on the cost justification issue necessarily impeaches the FTC's finding that A&P knew that Borden's prices could not have been cost justified, and the FTC's brief is disingenuous in asserting that A&P does not challenge that conclusion (FTC Br. 44).

differences are insufficient to justify the price differences. In such a case, even if the buyer knows the price difference in his favor is substantial (in *Automatic Canteen,* it was 33%) the FTC must still show "that such [service] differences *could not* give rise to sufficient savings" to allow cost justification "*and* that the buyer, *knowing* these were the only differences, should have known that they could not" (346 U.S. at 80, emphasis added). Here, the FTC failed to show any of these essential elements.

The administrative law judge, cognizant of *Automatic Canteen,* made findings of lack of cost justification based upon the Malone data (above at pp. 4-5). When A&P pointed out that the Malone calculations could not possibly support such a finding because they had nothing to do with the comparative cost of serving A&P and serving other customers (p. 5, n.5 above), the Commission recognized their infirmities (Pet. App. 50a) and refused to rely on them (Pet. App. 51a, n.25) or to rule on their accuracy (Pet. App. 54a, n.31).[21] Now, the FTC's brief relies on these calculations, and Borden's "meeting competition" caveat, as its principal proof of lack of cost justification (FTC Br. 57-60).

Preliminarily, the FTC argues that very little by way of proof should be required of it, paraphrasing *Automatic Canteen*'s "references to a buyer's trade experience, size of price discount as compared to cost savings, and possible representations by a seller regarding the lack of cost justification" (FTC Br. 48-49). However, those references were to circumstances which could "indicate knowledge on the buyer's part" (346 U.S. at 80) and not evidence of the absence of cost justification, which the Court presupposed. It is only "the size of the discrepancy between cost differential and price differential"

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[21] Mr. Malone had simply calculated Borden's average historical costs of serving *all* customers from its obsolete Chicago plant (using total costs divided by the number of "points" sold) and applied this average to A&P in negotiating with it. He did not attempt to estimate the cost of giving A&P the least feasible service from Borden's new Woodstock plant or to compare that cost with the cost of serving other customers (A&P Br. 5-6).

(*ibid.*) that could possibly show the existence or non-existence of cost justification, and it is precisely that comparison which is wholly lacking here.

The cases cited by the FTC (at pp. 50-54) illustrate this point. In each, there were either cost/price comparisons to support a finding of lack of cost justification or the methods of service did not differ so that there was no need for such comparisons. In *D & N Auto Parts Co.*, 55 F.T.C. 1279 (1959), *aff'd sub nom. Mid-South Distributors* v. *FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961), the Commission concluded that price differences of as much as 20% could not be justified by savings resulting from central billing, which were the only significant savings involved (55 FTC at 1300-01).[22] *American Motor Specialities Co.*, 55 F.T.C. 1430, 1446 (1959), *aff'd*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960), is to the same effect.

Similarly, in *Fred Meyer, Inc.* v. *FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968), cited at FTC Br. 51 and A&P Br. 34, the price reduction was not accompanied by any "changes in Meyer's costs or procedures which might provide cost savings for the suppliers" (359 F.2d at 364). Comparing the substantial price differentials (as much as one-third) to the evidence of negligible cost savings, the court of appeals concluded that "*Automatic Canteen*'s requirement of a cost/price comparison" was satisfied (*id.* at 365).

In *National Parts Warehouse*, 63 F.T.C. 1692 (1963), *aff'd sub nom. General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), *cert. dismissed under Rule 60*, 382 U.S. 923 (1965), the court of appeals held that substantial evidence justified the Commission's finding of no cost justification (346 F.2d at 317).

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[22] The Fifth Circuit, in affirming the Commission's decision, noted that "for all practical purposes, the order and shipment were handled exactly the same" as those of competitors and that "at least three of the major Suppliers acknowledged they could not justify the price reductions on the basis of lower costs" (287 F.2d at 518-19).

There, the Commission had examined at some length, and rejected, claims that savings were realized on freight, billing and selling expenses (63 F.T.C. at 1731-35); it concluded that "the 'differing methods or quantities' in which respondents buy could not have possibly saved [the sellers] the differences between the prices" charged respondents and competing purchasers (63 F.T.C. at 1730).[23]

The cases on which the Commission relies indicate only that a detailed study of all of the seller's costs is not required in every instance to establish a lack of cost justification. But *Automatic Canteen* does require the FTC to examine not only the differences in prices, but the costs involved when the sales were to persons who were served differently or bought in different quantities; when this comparison shows a lack of cost justification, the Commission must show knowledge of that fact on the part of the buyer.[24] The Commission here seeks to reverse and revise this process; as proof of lack of actual cost justification, it relies on four indicia from Borden which allegedly imparted knowledge of that "fact" to A&P. None of these indicia, however, even approach any comparison between prices and costs to A&P and to others. They are treated in order below.

1. *Borden's "meeting competition" comment,* according to the Commission, is the "first and foremost" item of evidence that shows lack of cost justification (FTC Br. 57). The Commission boldly "translates" this comment into "Borden's statements that its private label prices could not be cost justified" (FTC Br. 58). The fact is that all the Borden negotiators testified that at no time did anyone from Borden

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[23] *American News Co.* v. *FTC,* 300 F. 2d 104 (2d Cir. 1962), is even more clearly inapposite. That case held that a buyer violated § 5 of the FTC Act by inducing and receiving from his supplier promotional allowances prohibited by § 2(d) of the Robinson-Patman Act, as to which there is no cost justification defense.

[24] As to this, *Automatic Canteen* stated: "A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient" (346 U.S. at 80).

ever state that its prices were not cost justified *or* that they would not be made generally available (A&P Br. 11, n.15).[25]

While there is some confusion as to just what the Borden representatives said on the subject of meeting competition, Mr. Schmidt of A&P took their use of " 'meeting competition' or 'beating competition' " as "salesman's talk", occasioned by their embarrassment that Borden's first bid was so much higher than the competing bid (A71a, 123a).[26] Accordingly, Schmidt did not understand it as anything sufficiently significant to mention to anyone else at A&P. Instead, in the same conversation, he asked for a letter of availability to other customers and was given the impression he would receive it; Mr. Minkler testified Borden fully intended to make the same prices and terms generally available (A&P Br. 11, n.15). Since Borden had also talked of cost savings (A 207a-208a, 279a-280a, 303a-304a) and never disclaimed cost justification, Mr. Schmidt simply had no reason to interpret any comment regarding meeting competition as a denial of either cost justification or availability to others.

2. *Borden's "cost data supplied . . . to A&P"* are also cited as evidence that there could be no cost justification here (FTC

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[25] The assertion that the final Borden private label proposal was "offered on a meeting competition basis only" (FTC Br. 57) is founded entirely on testimony by Ralph Minkler of Borden (at the hearing below, but not in his pre-complaint testimony or pre-hearing deposition) that he said this to Mr. Schmidt when he submitted Borden's final offer to A&P. By the time of the hearing, Borden was A&P's co-defendant in a parallel treble damage action, *Parker* v. *The Great Atl. & Pac. Tea Co.*, No. 71-C-3075 (N.D. Ill., filed Dec. 22, 1971) in which its primary defense was that Borden had a meeting competition defense based on its reliance on A&P.

[26] Previously, when Borden was offering only a $410,000 reduction for private label under stringent service terms (although the same prices would subsequently be made available to everyone buying Borden label products on regular delivery terms), Borden had stated that it would make "almost no profit" at those prices (FTC Br. 5) and that it could not see "how anyone can sell any cheaper" (FTC Br. 6). By this stage of the negotiations, therefore, the Borden salesmen felt they had to restore their credibility. This kind of seller "puffing", even if it included a cost justification disclaimer, would not be binding on A&P as proof of lack of cost justification (*Automatic Canteen Co. of America* v. *FTC, supra,* 346 U.S. at 80 n.24).

Br. 59-60). This refers to the same "Malone calculations" shown above (pp. 4-5, 18) to have been discredited before the Commission and in the court of appeals as evidence of cost justification (Pet. App. 24a, n.11). The unreliability of those calculations prepared by Borden for purposes of these negotiations with A&P is underscored by Borden's response to A&P's request for a "cost justification analysis" of a subsequent private label proposal (A1003a). Borden declined to furnish such information, stating: "A cost justification analysis must of necessity involve the disclosure of confidential data regarding our operation. . . . *It has never been our policy to disclose such information to any customer or competitor*" (A1006a, emphasis added).[27]

The Commission's efforts to rehabilitate the Malone data in this Court are hardly persuasive. Its "explanation" that Borden's July 1965 proposal showed twice the "gross profit per point" figure it had asserted earlier (A&P Br. 5, n.7) because the July offer was the "first one based on calculations reflecting A&P's willingness to accept reduced service terms" (FTC Br. 60, n.43) is demonstrably erroneous. The initial private label offer submitted by Borden in February 1965 included all of the reduced service terms (A570a). The May and July 1965 proposals were for the balance of the area within A&P's Chicago Unit (outside the Chicago-Calumet region) and were on the same reduced service terms (A226a, 574a-589a).[28] Further, Mr. Schmidt's testimony that he had thought the deceased Mr. Malone was an honest salesman does not supply the requisite cost comparisons (FTC Br. 59, n.42).

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[27] While some of the data cited by the FTC (*e.g.*, CX 87 and 206, A804a-806a and 836a-839a, at FTC Br. 60, n.44) was not shown to A&P (A35a-36a), all of it was deficient in that no attempt was ever made to ascertain and compare the cost of the minimal service given to A&P with the cost of serving other customers. None of this data was relied on by the FTC or the court of appeals as showing lack of cost justification.

[28] The July 1965 submission was simply more detailed than the May offer in that it showed a range of prices for each product in several regions, depending upon whether weekly deliveries were to be on a three to a six-day basis (A106a-107a, 226a, 598a-618a).

In short, not only does the Borden "cost data" fail as proof of lack of cost justification, it reflects on the credibility and reliability of all the Borden representations.

3. *A&P's "trade experience" with Borden* is also said to show a lack of cost justification because (i) in January 1966 Borden made available a "limited service option" to its other customers, but at a smaller discount, and (ii) A&P did not acquiesce in Borden's 1966-67 request for a price increase of a few mills (FTC Br. 61-62). Regretably, such conclusory allegations require less space than their refutation.[29]

The so-called "January 1966 limited service option" does not negate cost justification. This was a paragraph in a schedule of volume discounts (of up to 26%) which allowed an additional 2% discount for certain service reductions, leaving unaffected other services and allowances that A&P had given up (CX 138, A832a).[30] This schedule was not disseminated to chain stores (A121a), and no proof was adduced that A&P knew about it. Only one of the allegedly disfavored Borden customers who were called as witnesses was even aware of this volume discount schedule and its "limited service option" (A344a, 350a, 365a, 377a, 388a, 407a, 417a, 424a) and other allegedly disfavored customers received discounts which were more

[29] The FTC disputes the justification for A&P's reliance on its trade experience with the "2-2-2" formula even though Borden had followed that formula precisely in submitting a private label proposal to A&P in New York (A&P Br. 12). It argues that Malone's "cost figures" showed that wage rates were higher in Chicago than in New York State (FTC Br. 60, n.43). The extent to which this Malone data (prepared to convince A&P that it "was getting a good deal", A60a, 81a-84a) might affect the 2-2-2 formula is not clear from the record, but in any event it did not relate to Borden's new Woodstock plant which was to serve A&P.

[30] A customer who accepted this "limited service option" would, unlike A&P, continue to receive the services of Borden's salesmen plus "merchandising materials, price promotions, demonstrators and special displays" (A781a), as well as competitive and other allowances (A200a, 333a-336a) and the benefit of the Borden label and Borden advertising, all of which were not available to A&P.

liberal than called for by this schedule and were paid on an inconsistent and unexplained basis (A536a-539a).

The Commission's brief also distorts the record as to the actual service differences between A&P and Borden's other customers. In our main brief, we stated (with record references) that *all* of the allegedly injured customers in Illinois received full service delivery as did *all* of the allegedly injured customers in Indiana except one store, which received allowances not provided to A&P (A&P Br. 31, n.31). The Commission's brief weakens this and asserts that there were stores "that did *not* receive more service than A&P [and] paid higher prices" (FTC Br. 61-62, n.45; emphasis in original). The source cited is a Borden employee who testified that deliveries to one non-A&P store in Hammond, Indiana, were physically similar to those to A&P stores except that, while A&P stores pre-ordered, the Borden driver would enter the non-A&P store, check the stock in the dairy case to see what was "on hand", refer to his route book to see what was normally required, and then go back to his truck and furnish the store with the difference (A195a). These steps are obviously more costly and involve more service than merely dropping off a pre-packaged order while picking up an order slip for the next day's delivery.[31]

The Commission next notes that A&P accepted a price increase of a few mills on brand label products (to make up for increased container and labor costs) while resisting the same increase on private label products (FTC Br. 62). Again, this argument is unrelated to the comparative cost of serving A&P and other customers. A&P resisted these requested increases because the container costs had increased before the private label negotiations were concluded (A802a) and because Bor-

[31] Mr. Szczepaniak, an assistant route foreman of Borden's Hammond, Indiana branch, evidenced no knowledge of the cost or economic significance of A&P's pre-ordering or giving up advertising services or competitive and other allowances available to this Hammond store and A&P's other competitors but not to A&P (compare A&P Br. 31, n.31).

den's labor costs in serving A&P were less than in serving others.[32] Moreover, we are here again dealing with "a matter of mills" and the kind of seller's statement which does not establish that the prices to A&P could not be cost justified.

4. *Borden's letter of legal assurances* is the fourth and final alleged "proof" of lack of cost justification (FTC Br. 62-63). Dated October 1, 1965, it stated: "We wish to assure you [A&P] that our prices are proper under applicable law and we are prepared to defend these prices" (A&P Br. 11). It is difficult to conceive how this letter could be notice by Borden that its prices were not cost justified, particularly when neither it nor any other document or statement so limited Borden's assurances. Borden presumably knew when it wrote this letter (as A&P did not) that it was about to reduce its regular prices so as to eliminate half the discount being offered to A&P. It could well have thought that it could cost justify the other half (although it was never called upon to do so) and in any event it intended to and did offer the same prices to others, as A&P expected it would.[33]

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[32] Since A&P was receiving minimal service on all products delivered to it, whether private label or Borden label, it might have been more logical for A&P to have resisted the labor portion of the price increase on all products.

[33] Contrary to the Commission's argument that "A&P has not identified any customer who received equally low prices from Borden" (FTC Br. 13, n.15), the record shows several such instances which were repeatedly pointed out below. In November 1965, Borden solicited the business of Kroger's 64 stores in the Chicago area, offering the same prices that A&P was paying for private label, but Kroger rejected the proposal because those prices were too *high* (A158a-165a, 167a-172a, 179a-181a, 1008a-1017a). Borden also made similar private label solicitations to National Tea and K Mart (A543a-547a, 1041a-1064a). Consolidated Foods bought Borden brand products at a discount from "list" of 37% (A46a, 540a-541a) as compared with 37.9% off "list" A&P was then receiving on private label under minimum service conditions (A1183a-1192a). Moreover, in September 1968, Eagle Food Centers bought from Borden at prices *lower* than those Borden was charging A&P; A&P became aware of this only when Borden gave the A&P stores in Eagle's area a reduction in private label prices to bring them in line with Eagle (A175a, 237a, 285a-286a, 1018a-1040a).

At the hearing below, FTC counsel took a quite different view of Borden's letter. They strenuously opposed A&P's introduction of it (A95a-100a), and did not attempt to introduce any "customary letter of availability" (FTC Br. 62). This "letter of assurances" was copied verbatim in other letters from Borden to A&P in which Borden interpreted its phrase "prices are proper under applicable law" as covering "any implications that may be required as to availability under the Robinson-Patman Act" (A&P Br. 11, n.16). These facts expose the absurdity of the FTC's attempt to convert Borden's letter of legal assurances into proof of an absence of cost justification.

CONCLUSION

The Commission's attempt to reverse *Automatic Canteen,* and to extend *Kroger* to condemn the honest buyer, should not be countenanced for a variety of reasons stated above and in our main brief. The most serious of these is that, if the FTC's efforts were to succeed here, it would artificially restrain the normal give-and-take of the bargaining process, and would result in higher prices at both wholesale and consumer levels.

Instead, the judgment below should be reversed and the case remanded for dismissal of the complaint.

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